SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1169

THE MASSMAN CONSTRUCTION COMPANY,

Petitioner,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

I. Opinion Below

The petition seeks a writ directed to the Court of Claims of the United States, to review a judgment rendered by that Court in the action there entitled "The Massman Construction Company v. The United States of America." (R. 63)

II. Statement of the Case

A full statement of the facts is found in the petition beginning at page three and ending at page eight, which in the interest of brevity will not be repeated here.

III. Argument.

The Court below is empowered to grant the relief here sought through the exercise of its equitable jurisdiction.

United States v. *Milliken Imprinting Co.*, 202 U. S. 168, and *William Cramp and Sons Ship and Engine Building Company* v. *United States*, 239 U. S. 221.

The rule respecting reformation of instruments has been broadly stated and applied. Its singular purpose is to apply equitable principles to the end that there may be no unjust enrichment on the one hand, and no irreparable damage on the other. Before reformation may be availed of, the instrument itself must fail to express the agreement of the parties, either because of mutual mistake or mistake, inadvertence, or accident on the one side and fraud or inequitable conduct on the other. *Hazeltine Research Corporation et al.* v. *Freed-Eisemann Radio Corporation*, 3 F. (2d) 172; *Wichita Petroleum Co. et al.* v. *Winant et al.*, 295 Fed. 67; *Burnes et al.* v. *Burnes et al.*, 137 Fed. 781. However, if the instrument does fail to express the real agreement or transaction due to either mutual mistake or to mistake, inadvertence, or accident on the one side and fraud or inequitable conduct on the other, and reformation is essential to give complete legal effect to the instrument, it will be allowed. *Columbian Nat. Life Ins. Co.* v. *Black*, 35 Fed. (2d) 571; *Westinghouse Electric & Mfg. Co.* v. *Tri-City Radio Electric Supply Co. et al.*, 23 Fed. (2d) 628; *Southern Surety Co.* v. *United States Cast Iron Pipe & Foundry Co.*, 13 Fed. (2d) 833. The abbreviated rule is stated in *Simmons Creek Coal Company* v. *Doran*, 142 U. S. 417:

> "The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted * * *"

Williston on Contracts, Vol. V, Rev. Ed., Paragraph 1548, says:

> "Knowledge by one party of the other's mistake regarding the expression of the contract is equivalent to

> mutual mistake. Thus if one party *before the execution of the instrument* knew of or discovered the error in it, reformation will be allowed against him though the mistake is not strictly mutual",

citing among others *Columbian Nat. Life Ins. Co.* v. *Black*, *supra; Wasatch Min. Co.* v. *Crescent Min. Co.*, 148 U. S. 293; *Scott* v. *Spurr*, 169 Ky. 575, 184 S. W. 866; *Ratan* v. *Clark*, 220 Mich. 493, 190 N. W. 244; *Welles* v. *Yates*, 44 N. Y. 525; *Moody* v. *Smoot Adv. Co.*, 98 W. Va. 261, 126 S. E. 919. "Knowledge" by the respondent of the petitioner's mistake here was "equivalent to a mutual mistake" under that rule—not a disqualification, from equity, as the Court below held.

Although clearly conceding by the adopted Findings that a mistake was made, Mr. Justice Madden, below, held that because the petitioner had knowledge of the mistake at the time it entered into the contract, there was no mistake, or, in effect, that the petitioner had, by entering into the contract, waived the mistake, notwithstanding the contract was signed under written protest, and primarily because the petitioner realized that its failure to do so would work a forfeiture of its bid bond. Mr. Justice Madden says:

> "*At the time the contract was awarded to the plaintiff, pursuant to its bid, and at the time it signed the contract, the plaintiff was not mistaken.* It had become aware of the mistake in its bid, and faced the problem of whether it was willing to sign a contract for the figure which it had, by mistake since discovered, bid. The Government was also aware of the plaintiff's claim that it had made a mistake in its bid. There was not, then, at the time of signing the contract, any lack of knowledge, either mutual or unilateral, which caused either of them to make the contract which they did make, when in fact they intended to make a different contract." (Italics supplied) (R. 60).

This language of the Court is difficult of understanding—since knowledge of a mistake would be indispensable to its correction—especially in view of the attitude of that Court in *Edwin Dougherty and M. H. Ogden, Trading as Ogden and Dougherty* v. *United States,* No. 45856, decided October 2, 1944, which has not been reported, a case on all fours except that there the plaintiff had knowledge of the mistake at the time of entering into the contract, *but failed to impart that knowledge to the Government,* which the Court said was fatal, citing the illustration of the rule in Section 503 of the *Restatement of the Law of Contracts,* as dispositive, which reads:

> "A, in answer to an advertisement of B for bids for the construction of a building according to stated specifications, sends B a bid of $50,000. B accepts the bid. A, in the calculation that he makes prior to submitting his bid, fails to take into account an item of construction that will cost $5,000. *If B knows, or because of the amount of the bid or otherwise, has reason to know that A is acting under a mistake, the contract is voidable by A, otherwise not.*" (Italics supplied.)

Here the petitioner not only had knowledge of the error, but it supplied the other essential, namely, it imparted that knowledge to the other contracting party. The Court below did not say in the *Dougherty* case, as it did here, that plaintiff had knowledge of the mistake, therefore, there was no mistake; it simply said that plaintiff failed to impart that knowledge (as the petitioner did here) hence, relief was denied. Irrespective of the notice which was given, the respondent should have suspected, at least, because of the disparity in bids, that a mistake had been made, petitioner's bid having been $252,600 lower than the next lowest bid, and $85,801 less than the Government's own estimate, the latter of which would, of course, exclude any element of profit.

Clearly, the bid and the contract which followed wholly

ailed to express, by reason of the mistake, the intention of he petitioner, and, indeed, it is logical to say, the intention f the respondent. It is obvious, from the facts, that the etitioner fully recognized and intended, from the outset, hat equipment would be indispensable to the prosecution f the work; that the respondent also knew and fully ex- ected and intended that such equipment would be used; hat the petitioner fully expected and intended that it should e compensated for the use of that equipment and, we have right to assume, we believe, that the respondent also xpected to make just payment therefor, thereby forming he foundation for reformation in order to express the true ntention of the parties not set forth in the written instru- ent. It would seem that the Court's ruling below is that he petitioner had, in effect, waived the mistake by having ntered into the contract with knowledge thereof, completely gnoring the fact that the contract was executed under ritten protest, thereby showing that the petitioner had ever intended to give up its right to just compensation for he use of its equipment, for which it is still seeking redress efore this Court.

The decision of the Court below is in conflict with the prin- iples set forth above and as laid down by this Court in learne v. *Marine Ins. Co.*, 20 Wall. 488, and *Moffett, Hodg- ins, etc. Co.* v. *Rochester*, 178 U. S. 373. In the latter case, he action grew out of certain errors in bids submitted by the omplainant for the making of certain improvements for the ity of Rochester, for which the claimant brought a bill in he lower Court, praying reformation of the bids to con- orm to the intention in making them, or their rescission. The lower Court sustained the bill of the complainant and ranted relief, the decision of which was reversed by the ourt of Appeals; and this Court, in its decision, reversed he Court of Appeals, thereby affirming the lower Court.

There the City of Rochester gave notice to contractors that proposals would be received at a stated time for the doing of certain construction work, necessitating two separate contracts, referred to by the Court as Contracts Nos. 1 and 2. The complainant intended to bid 70¢ per cubic yard for certain excavation work in connection with the proposals, which the Court found was "a fair and reasonable price for the work", and that sum was inserted in one of the proposals, but in one of the other proposals, as the Court found, "by accident and mistake" 50¢ was inserted. Also, the defendant's engineer estimated the quantity of excavation under another item at 2,000 cubic yards for which the intended charge was $15.00 per cubic yard, "which was a fair and reasonable charge". The Court found that "In haste and confusion" the engineer "who is extremely near-sighted", in transcribing his figures, by accident and mistake, inserted the sum of $1.50 per cubic yard. A bid bond was required, which was executed by the complainant. The complainant was led to believe that the two operations, although separately described, constituted a continuous piece of work and that any person bidding upon both sections, whose bid was lower in the aggregate for the same work, should be awarded the contract. The bids, as so prepared, were duly filed with the executive board of the City of Rochester and were finally opened in the presence of the complainant's agent. The Court reviewed the amounts of the bids of the other contractors as compared with those of the claimant and stated that its aggregate bids were "considerably less than the aggregate of any other contractor". The Court found that,

> "In order to take an improper and unconscionable advantage of complainant and the clerical errors made by it, the executive board on the 10th of January, 1893,

notified complainant that the defendants intended to enter into a contract for the work of Contract No. 1,"

ith another contractor,

"although complainant's proposals for the work on both contracts were the lowest in the aggregate for the entire work contemplated."

Before any official action had been taken with respect to etting the contracts, complainant protested against the ivision of the proposals and letting of the work on Con- racts Nos. 1 and 2 separately, and insisted that the defend- nts were bound to enter into a contract with it for the ntire work described in both contracts or none at all, and nformed the defendants of the clerical errors and requested hat they be corrected. It further demanded the contract or both sections of the proposals *at the correct prices* "or hat it be permitted to withdraw its proposals". The Court ound that,

"On the 12th of January, 1893, the executive board acting in bad faith and to take an unfair and unconscionable advantage of the clerical errors which had been committed, * * *"

dopted certain resolutions pertaining to action for com- elling the complainant to carry out its proposals, about hich the Court said,

"The said threatened action was contrary to good conscience, the contents of the proposals and the rights of complainant, and, unless restrained, would cause it irreparable injury, for which there was no adequate remedy at law."

he lower Court entered a decree adjudging the proposals f the claimant "rescinded, canceled, and declared null,

void, and of no effect". The Circuit Court of Appeals re
versed the decision of the lower Court with instructions t
dismiss the bill, although both Courts, as Mr. Justice Mc
Kenna remarked, agreed that "there was a mistake". Th
Circuit Court of Appeals based its decision upon the groun
that there was a "negligent omission" with respect t
which Mr. Justice McKenna remarked,

> "We do not think the negligence was sufficient to pre
> clude a claim for relief if the mistakes justified it."

and this Court thereupon set forth the following principles
being its own language in *Hearne* v. *Marine Ins. Co., supra*
saying,

> "The reformation of written *contracts* for fraud o
> mistake is an *ordinary* head of equity jurisdiction
> The rules which govern the exercise of this powe
> *are founded in good sense and are well settled. Wher
> the agreement as reduced to writing omits or contain
> terms or stipulations contrary to the common intentio
> of the parties, the instrument will be corrected so as t
> make it conform to their real intent. The parties wi
> be placed as they would have stood if the mistake ha
> not occurred.*
>
> "The party alleging the mistake must show exactl
> in what it consists and the correction that should b
> made. The evidence must be such as to leave no reason
> able doubt upon the mind of the court as to either o
> these points. The mistake must be mutual, and com
> mon to both parties to the instrument. It must appea
> that both have done what neither intended. A mistak
> on one side may be a ground for rescinding, but not fo
> reforming a contract. Where the minds of the partie
> have not met there is no contract, and hence none t
> be rectified." (Italics supplied)

The findings of the Court below, it must be borne in mind
clearly concede that a mistake was made and that the pet

tioner was not compensated for the use of its equipment but say the petitioner knew of the mistake when it entered into the contract, therefore there was no mistake, ignoring the well-settled principle that "Equity regards substance rather than form". The substance here is that the respondent has had the use of valuable machinery and has not compensated the petitioner therefor—the form is that a contract has been entered into, under protest, containing a mistake, the veil of which equity will pierce in order to get at the substance of the transaction and grant relief, either by reformation or rescission. In *Board of School Commissioners of City of Indianapolis* v. *Bender*, 36 Ind. App. 164, the Court said,

> "It is an equitable rule declared by Mr. Kent 'that he who errs is not considered as consenting' ".

Thus, when the petitioner entered into this contract, still maintaining its right to have the error corrected, it cannot be "considered as consenting" to its terms, especially in view of its written protest. The record below clearly shows exactly in what the error consists and how it should be corrected and should leave no reasonable doubt upon the mind of anyone.

While we believe that the mistake here was mutual within the meaning of the rule as reported by *Williston, supra*, and that the petitioner's case falls squarely within the illustration of the rule in the *Restatement of the Law of Contracts, supra*, and the cited cases, we call the Court's attention to the fact that the petition and arguments below sought, in the alternative, a rescission of this contract so that if the Court should believe that the mistake was unilateral it should follow the latter part of the above stated rule expressed by this Court where it says,

> "A mistake on one side may be ground for rescinding, but not for reforming, a contract."

The Court in the *Moffet* case refers to the action of the board in accepting the complainant's proposals "containing the mistakes" as "inequitable", saying,

> "It offered or forced complainant the alternative of taking the contract at an unremunerative price, or the payment of $90,000 as liquidated damages."

With respect to which the Court said, "The rule between individuals is that until a proposal be accepted it may be withdrawn * * *". That is exactly what the plaintiff in this case attempted to do but in a manner which would not endanger its equities should it need to invoke equity, realizing the maxim that "He who seeks equity must do equity" and that "He who comes into equity, must come with clean hands". But the respondent would not consent to withdrawal.

After commenting upon the charter provision of the City of Rochester, prohibiting a bidder from withdrawing after having submitted a bid, the Court stated that this was a perfectly proper provision, but quoted the language of the Court below in answer, saying:

> "The complainant is not endeavoring 'to withdraw or cancel a bid or bond.' The bill proceeds upon the theory that the bid upon which the defendants acted was not the complainant's bid; that the complainant was no more responsible for it than if it had been the result of agraphia or the mistake of a copyist or printer. In other words, that the proposal read at the meeting of the board was one which the complainant *never intended to make, and that the minds of the parties never met upon a contract based thereon. If the defendants are correct in their contention, there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If,*

through an error of his clerk, he has agreed to do work worth $1,000,000 for $10.00, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven into bankruptcy. The defendant's position admits of no compromise, no exception, no middle ground.'' (Italics supplied)

The Court then added its own observation, stating,

"These remarks are so apposite and just it is difficult to add to them."

We, too, believe that the remarks of the Court there are apposite in the instant case. The decision of the Court below, we respectfully submit, is in conflict with the principles laid down by this Court and the principles to which we have referred governing such cases. In fact, although we have diligently searched the reports, it would appear that the rule laid down by the Court below is entirely without precedent.

In *Edward A. Dunn* v. *P. D. O'Mara,* 70 Ill. App. 609, the question of reformation of an instrument was brought before the court of equity. In that case an erroneous estimate was made of the number of cubic yards of excavation to be accomplished under the contract, the unit cost of such work having been agreed to be 7½¢ per cubic yard. The parties agreed to 15,333-1/3 cubic yards, whereas the Court found that in truth there were only 7,666 yards to be removed. In granting reformation, the Court said,

"It matters not that the parties knew they were signing a contract in which the price was fixed at $1,150. The question is not, did the parties know what words were used, but rather do the words used express the real intention of the parties?'' (Italics supplied)

After making the above observations, the Court says:

"Where it is sought in equity to reform a written instrument *the chancellor will look beyond the question*

> *of whether the parties signing it knew and understood the exact words employed to the true intentions of the parties when they agreed upon the words. If the instrument does not express the true intention, although there was no slip of the pen or mistake made in merely writing words, the instrument will be reformed.* The mistake here consisted solely of an erroneous mathematical calculation, and authority for correcting it is abundant." (Italics supplied)

It is respectfully urged that the Court below should have looked beyond the mere signing of the contract and should have looked to the intention of both parties; that is, *the intention to furnish labor and equipment and the intention to pay and receive compensation therefor.* Full equitable weight should have been given to the fact that the plaintiff actually furnished the use of valuable equipment—which the findings of fact show were necessary to be used upon the particular job—also that the sum of $88,000 was a reasonable charge and to the fact that without equitable relief the defendant will have been enriched to the extent of that use and conversely, the plaintiff will suffer irreparable damage. The fact that full and seasonable disclosure was made to the defendant and its good faith in going ahead with the job rather than refusing to do so should also have been given its equitable consideration. The decision of the Court below is clearly in conflict with the principles of that case.

In *Board of School Commissioners of City of Indianapolis* v. *Bender, supra,* the facts involved are strikingly similar to those in the present case. The estimator there, in making up his estimate from his estimate book for the purpose of submitting his bid, by mistake turned two leaves of the book, thereby omitting an estimate on one part of the work, in consequence of which his bid as submitted was several

thousand dollars lower than he intended. The bid was accepted. After such acceptance, the bidder having discovered that a mistake had been made, notified the other contracting party that he had made a mistake and consequently did not care to go through with the contract. The Court found that the "acceptance", because there was no meeting of the minds of the parties, in equity, did not create a contract. The Court there cites the language of Mr. Justice Storey in his work on *Equity Jurisprudence* at Section 1381, who, speaking of mistakes as affecting contracts, says:

> "But where the mistake is of *so fundamental a character* that the minds of the parties have never in fact met, *or where an unconscionable advantage has been gained by mere mistakes* or misapprehension, and there was no *gross* neglect on the part of the plaintiff, either in falling into the error or in not sooner making redress, and no intervening rights have accrued, and the parties may still be placed in status quo, equity will interfere, in its discretion, *in order to prevent intolerable injustice.*" (Italics supplied.)

We submit that the mistake here is so fundamental that the minds have never met; that an unconscionable advantage has been gained by reason of the mistake, furthermore that there was no gross negligence on the part of the plaintiff, either in falling into the error or in not sooner making redress. We also contend that no intervening rights had arisen at the time the mistake was brought to the attention of the defendant. Cf. *Long* v. *Inhabitants of Athol*, 196 Mass. 497, 82 N. E. 665, and *Harran* v. *Foley*, 62 Wis. 584, 22 N. W. 837.

The decision of the Court below is not only in conflict with the foregoing but is in conflict with its own decisions in *Hygienic Fibre Co.* v. *The United States*, 59 C. Cls. 598; *Poole Engineering and Machine Company*, 58 C. Cls. 9; and

more particularly, a recent decision of that Court in *Edmund J. Rappoli Company, Inc.* v. *The United States*, 98 C. Cls. 499, which latter decision the petitioner stressed for relief. In that case the plaintiff made a mistake in its bid; it was notified on the day following opening of bids that it was the lowest bidder and upon the receipt of that communication in going over its figures discovered the error and notified the defendant, requesting that the contract be awarded as corrected. Notwithstanding the protestations of the plaintiff the contract was formally awarded on the basis of the erroneous bid and was entered into by the plaintiff, the plaintiff filing a claim with the Comptroller General, which was denied. The plaintiff sued in the Court of Claims for reformation of the contract and relief was awarded. The Court below in the instant case distinguished the *Rappoli* case on the ground that,

> "concurrently with the signing of the contract, the Government's agents promised the contractor that, upon the fulfillment of certain conditions that were found by the Court to have been fulfilled, the mistake would be corrected"

whereas, the Court said, no such promise was made here. We argued there that while hopes were held out to the plaintiff in that case that the mistake would be rectified, even as they were here, there is no finding of fact whatsoever that any such "promise" was ever made, hence the decision could not have been predicated upon that principle but rather upon the principle that a mistake had been made which justified reformation. Any such promise, if there had been one, under the principles of equity already discussed, would have been purely incidental to the awarding of relief, if, as the Court found, a mistake had been made. So that, the decision was entirely justified on the ground of mistake but not upon the ground that any promise was

made concurrently with the making of the contract that the mistake would be rectified. To hold otherwise would completely nullify the equitable relief by reformation merely by the Government's agents refusing to recognize the error and by refusing to hold out any hope of rectification in all cases where mistake has been made.

IV. Conclusion

For the foregoing reasons, it is submitted that the petition filed herewith and as a part hereof for a writ of certiorari should be granted.

Respectfully submitted,

PHIL D. MORELOCK,
902 Bowen Building,
Washington 5, D. C.,
TEMPLE W. SEAY,
902 Bowen Building,
Washington 5, D. C.,
Attorneys for Petitioner.